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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PHAM,

Defendant and Appellant.

G051849

(Super. Ct. No. 11WF2969)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Thomas A. Glazier, Judge. Affirmed.

Randall Conner, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor, Alana
Butler and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In January 2012, Michael Pham pleaded guilty to, and was convicted of, one count (Count 1) of felony drug possession (Health & Saf. Code, § 11377, subd. (a)) and one count (Count 2) of misdemeanor street terrorism (Pen. Code, § 186.22, subd. (a)).¹ After passage of Proposition 47 (the Safe Neighborhoods and Schools Act) in 2014, Pham brought a petition to reduce Count 1 to a misdemeanor. The trial court granted the petition. Pham then moved to dismiss Count 2 on the ground that reduction of Count 1 to a misdemeanor meant there was no longer felonious conduct on which to base a conviction under section 186.22, subdivision (a) (section 186.22(a)). The trial court denied the motion to dismiss Count 2, and Pham appeals.

We affirm. The crime of street terrorism under section 186.22(a) has as an element that the defendant “willfully promotes, furthers, or assists in any felonious criminal conduct by members of [a] gang.” The felonious criminal conduct alleged against Pham was the felony drug possession that was charged in Count 1. The issue presented is whether the street terrorism conviction survives after the trial court reduced the felony conviction for drug possession to a misdemeanor. We conclude it does. The crime of street terrorism under section 186.22(a) does not require that anybody sustain a conviction for that conduct. Although Pham’s felony *conviction* for drug possession was reduced to a misdemeanor, the *conduct* that resulted in the conviction for street terrorism was felonious when committed.

FACTS AND PROCEDURAL HISTORY

I. Facts Related to Underlying Conviction

An amended complaint, filed in January 2012, alleged that, on or about December 22, 2011, Pham possessed Ecstasy in violation of Health and Safety Code

¹ Code citations are to the Penal Code unless otherwise indicated.

section 11377, subdivision (a) and committed misdemeanor street terrorism in violation of section 186.22(a) by actively participating in a criminal street gang called Dragon Family. Pham pleaded guilty and, on the plea form, wrote as the factual basis for his plea: “[O]n 12-22-11 I willfully and unlawfully possessed a controlled substance, 3-4 methylenedioxy methamphetamine, aka Ecstasy (MDMA) and I did this crime as an active participant in Dragon Family, a criminal street gang, which I know has more than 3 members, a common sign, is an ongoing group, and has engaged in a pattern of criminal gang activities, primarily crimes under [section] 186.22(e) and I did willfully and unlawfully promote, further and assist in criminal conduct by members of the Dragon Family gang.”

Imposition of sentence was suspended and Pham was placed on three years of formal probation with terms and conditions, which included serving 44 days in jail. However, Pham was found to be in violation of probation in November 2012, May 2013, and November 2013. Upon the third probation violation, the trial court revoked and reinstated probation. At the same time, the court sentenced Pham to a term of 16 months in prison for probation violation in a different case.

II. Pham’s Section 1170.18 Petition

In February 2015, Pham brought a petition for resentencing under section 1170.18 to designate both Count 1 and Count 2 as misdemeanors. The district attorney did not oppose the petition as to Count 1, and opposed the petition as to Count 2 because it already was a misdemeanor. Pham withdrew the petition as to Count 2. The trial court granted the petition as to Count 1 and resentenced Pham to informal probation.

Pham’s attorney moved orally to dismiss Count 2 based on resentencing under Count 1. Counsel argued: “[B]y operation of law count 2 should be dismissed because part of that count there needs to be a felonious conduct in order for that charge to be added onto a case, and since there’s no felony in this case, I believe that by operation of law that charge should be dismissed.” The trial court denied the motion to dismiss

because “[i]t[is] not within the provisions of Prop 47 to dismiss a [section] 186.22 that he was properly convicted of.” Pham timely appealed from the order denying his motion to dismiss Count 2.

DISCUSSION

I.

Proposition 47

““On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act’ [Citation.] ‘Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).’ [Citation.]” (*People v. Morales* (2016) 63 Cal.4th 399, 404.)

Proposition 47 created two separate procedures for designating an offense as a misdemeanor. A defendant who is currently serving a felony sentence for an offense now classified as a misdemeanor by Proposition 47 may petition to recall the sentence and request resentencing. (§ 1170.18, subd. (a).) If the defendant meets the statutory eligibility criteria, he or she is entitled to resentencing unless the trial court determines, in its discretion, that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) Eligible persons who have already completed their sentences for such offenses may file an application to have their felony convictions designated as misdemeanors. (§ 1170.18, subds. (f), (g).)

Under section 1170.18, subdivision (k), “[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) [of section 1170.18] shall be considered a misdemeanor for all purposes,

except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm”

II.

The Street Terrorism Conviction Survived Designation of the Drug Possession Offense as a Misdemeanor.

The crime of street terrorism is defined in section 186.22(a) as follows:

“Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment”

In this case, the “felonious criminal conduct” serving as the predicate for Pham’s conviction for street terrorism under section 186.22(a) was possession of Ecstasy, for which he was convicted under Count 1. The trial court granted Pham’s petition under Proposition 47 and designated Count 1 as a misdemeanor. The trial court did not err by denying Pham’s motion to dismiss Count 2 because, we conclude, the street terrorism conviction survived designation of Count 1 as a misdemeanor.

In *People v. Valenzuela* (2016) 5 Cal.App.5th 449, 451 (*Valenzuela*), the court addressed virtually the identical facts and likewise concluded the street terrorism conviction survived. In *Valenzuela*, the defendant was convicted of grand theft with an enhancement under section 186.22, subdivision (b)(1) for having committed that crime for the benefit of a criminal street gang. (*Valenzuela, supra*, at p. 451.) The defendant was also convicted of street terrorism under section 186.22(a). (*Valenzuela, supra*, at p. 451.) After Proposition 47 took effect, the defendant successfully petitioned the trial court to have this grand theft conviction designated as a misdemeanor. (*Valenzuela, supra*, at p. 451.) The trial court denied the defendant’s motion to dismiss the street terrorism conviction. (*Id.* at p. 452.) The Court of Appeal affirmed because “the street terrorism conviction did not require a felony conviction; it required only that [the

defendant]’s conduct (which resulted in the grand theft conviction) was felonious *at the time he engaged in it.*” (*Ibid.*)

The court in *Valenzuela* explained: “‘The gravamen of the [street terrorism offense] is active participation in a criminal street gang.’ [Citation.] To that end, it requires participation in the ‘felonious criminal conduct’ of at least one other gang member. [Citations.] It does not require that anyone sustain a conviction for that conduct. Because the focus is on the commission rather than the conviction of a felony, it is irrelevant that [the defendant]’s theft conviction ‘shall [now] be considered a misdemeanor for all purposes.’ [Citation.]” (*Valenzuela, supra*, 5 Cal.App.5th at p. 452, some brackets added.)

We agree with the reasoning of *Valenzuela*. Designating Pham’s conviction for drug possession as a misdemeanor did not change the nature of the conduct, which was felonious when committed. Section 186.22(a) does not require that anyone be convicted of a felony for that conduct in order to support a conviction for street terrorism. In contrast, the gang enhancement under section 186.22, subdivision (b) applies only to a person who is “*convicted of a felony* committed for the benefit of, at the direction of, or in association with any criminal street gang.” (Italics added.) Section 186.22(a) required only that Pham willfully promote, further, or assist in “any felonious criminal conduct” by gang members.

Although a violation of Health and Safety Code section 11377, subdivision (a) is a “‘wobbler,’” punishable either as a felony or a misdemeanor (*People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1256), the conduct charged in Count 1 was and remained felonious. Pham was charged in Count 1 with felony violation of Health and Safety Code section 11377, subdivision (a) and convicted of a felony violation. A wobbler becomes a misdemeanor for all purposes under the circumstances listed in section 17, subdivision (b) (section 17(b)). Those circumstances include the imposition of a misdemeanor sentence. (§ 17(b).) When that occurs, “the offense is a misdemeanor

from that point on, *but not retroactively*.” (*People v. Feyrer* (2010) 48 Cal.4th 426, 439, italics added.) Thus, designation of the conviction under Count 1 as a misdemeanor under section 1170.18 does not mean under section 17(b) the conduct giving rise to that conviction is no longer felonious.

Our conclusion is consistent with the language in section 1170.18, subdivision (k) that the offense shall be considered a misdemeanor “for all purposes” and with *People v. Abdallah* (2016) 246 Cal.App.4th 736 (*Abdallah*). In *Abdallah*, the Court of Appeal held that the reduction of a prior felony to a misdemeanor pursuant to section 1170.18 precludes the trial court from using it as the basis for imposing an enhancement under section 667.5, subdivision (b). The *Abdallah* court construed the phrase “for all purposes” in section 1170.18, subdivision (k) to mean the same as it does in section 17(b). (*Abdallah, supra*, at p. 745.)

In *People v. Park* (2013) 56 Cal.4th 782, 787, the California Supreme Court held that once a wobbler conviction had been reduced to a misdemeanor, the offense no longer qualified as a prior serious felony within the meaning of section 667, subdivision (a) and could not be used under that provision to enhance the defendant’s sentence. Applying the same logic, the *Abdallah* court concluded that designation of an earlier felony conviction as a misdemeanor pursuant to section 1170.18 meant that the defendant no longer was a person who had committed an offense which had resulted in a conviction within the meaning of section 667.5, subdivision (b) and, therefore, was not subject to the prison term enhancement. (*Abdallah, supra*, 246 Cal.App.4th at pp. 745-746.)

In contrast, Pham engaged in felonious criminal conduct when he possessed the Ecstasy, and “[t]hat is true regardless of his [felony] conviction . . . and its subsequent reduction to a misdemeanor.” (*Valenzuela, supra*, 5 Cal.App.5th at p. 453.) Treating Pham’s conviction for Ecstasy possession as a misdemeanor “for all purposes” does not affect his conviction for street terrorism because section 186.22(a) requires felonious criminal conduct, not a felony conviction.

DISPOSITION

The order denying Pham's motion to dismiss Count 2 is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.